YAVAPAI COUNTY ATTORNEY'S OFFICE
Sheila Polk, SBN 007514
County Attorney
ycao@co.yavapai.az.us
Attorneys for STATE OF ARIZONA

IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S RESPONSE TO MOTION TO COMPEL/REQUEST FOR SANCTIONS** **(The Honorable Warren Darrow)**

The State of Arizona, through undersigned counsel, requests this Court to deny the Defendant's Motion to Compel etc., for the reasons that Defendant seeks to obtain material from the State that is protected by the work product doctrine. Defendant's Motion is without legal merit. Defendant has received all of the State's evidence in this case – over 4600 pages of disclosure. What they seek now is to discover the attorneys' notes, the investigator's summary and analysis of the evidence, the State's legal theories, and the State's work product by inquiring into conversations between the prosecutors, investigators and medical examiners about the evidence. This thinly veiled effort to violate the State's work product privilege must be denied by this Court.

The State's position is more fully set forth in the Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The Facts:

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

On October 8, 2009, Yavapai County Sheriff's Office responded to the Angel Valley Retreat in Sedona, Arizona, for a report of numerous people in various stages of medical distress. Upon arrival, detectives were informed two persons had died after being transported to the Verde Valley Medical Center and other individuals were in altered levels of consciousness and having difficulty breathing. The subsequent investigation revealed the deaths occurred after approximately 55 people took part in a two-hour ceremony in a sweat lodge. In addition to James Shore and Kirby Brown, the two people who died, numerous others were hospitalized. On October 17, 2009, a third participant, Liz Neuman, died.

Autopsies were performed on James Shore and Kirby Brown by Dr. Robert E. Lyon of the Yavapai County Medical Examiner's Office, and on Liz Neuman by Dr. A. L. Mosley of the Coconino County Medical Examiner's Office. Dr. Lyon concluded the cause of death of both Kirby Brown and James Shore was heat stroke; Dr. Mosley concluded the cause of death of Liz Neuman was multisystem organ failure due to hyperthermia due to prolonged sweat lodge exposure. On February 3, 2010, the Yavapai Grand Jury indicted Defendant on three counts of manslaughter for the deaths of victims Kirby Brown, James Shore and Elizabeth Neuman.

The medical examiners interviewed by Defendant's attorneys have clarified that any distinction between heat stroke and hyperthermia is in the wording.

> MOSLEY: I had my own reasons for not wanting to call it heat stroke. And it's just you know wording basically, **there's no real difference** in them uh in what we mean by our words…

Exhibit 54 to Truc Do Declaration, Interview of Dr. Mosley, Coconino County Medical Examiner, by Truc Do, 5/21/10, p. 11 (emphasis added).

> DO: Okay, so then if you can explain to me what is the, what is the disagreement with the phrase heat stroke as compared to hyperthermia?
>
> MOSLEY: It's wording.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

DO. Just wording.

MOSLEY: Yeah.

Id. at p. 21, lines 2-6.

> LI: Okay. So, it seems like then perhaps you're aware that there might've been differences of opinion about you know whether about hyperthermia versus heat stroke and what have you prior to that meeting?
>
> LYON: Yeah.
>
> LI: How were you made aware of that?
>
> LYON: Well, that's just something I would think of because based on my work experience, some people go with hyperthermia and some go with heat stroke.

Exhibit 63 to Truc Do Declaration, Interview of Dr. Lyon, Yavapai County Medical Examiner, by Truc Do, 6/17/10, p. 23, lines 9-16.

On December 14, 2009, a meeting was held at the Yavapai County Attorney's Office during which the lead investigator from the Yavapai County Sheriff's Office presented the case to the prosecutors for a charging decision. Several prosecutors were present along with staff; present also were investigators from the Yavapai County Sheriff's Office and members of both the Yavapai County and the Coconino County Medical Examiners Offices. At the meeting, the investigators presented a PowerPoint as part of their request for a charging decision. After the meeting, the State sent a letter reminding participants of the work product privilege and asking participants to respect that privilege with respect to copies of the PowerPoint that had been disseminated. *Exhibit A, attached, Letter from Sheila Polk dated December 16, 2009.*

Defense Interviews of State's Witnesses

Attorneys for Defendant interviewed Dr. Mosley, the Coconino County Medical Examiner, on May 21, 2010. During the interview, they learned of the meeting held at the Yavapai County

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Attorney's Office on December 14, 2009. Three days later, attorneys for Defendant demanded from the State:

(1) The names of all persons in attendance, whether personally or telephonically;

(2) A copy of the PowerPoint and any other documents or demonstratives presented during the conference;

(3) The audio recording of the meeting;

(4) Any notes taken by any attendants in connection with the conference;

(5) The existence of any *Brady* material that arose in the conference.

Exhibit 55 to Truc Do Declaration, Letter from Truc Do dated May 24, 2010. The State responded by notifying Defendant the meeting was protected by the work product doctrine. *Exhibit 56 to Truc Do Declaration, Letter from Sheila Polk dated May 26, 2010.*

On June 16, 2010, during the interview of Yavapai County Sheriff's Detective Ross Diskin, in an effort to address the concerns of the Defense Attorneys as to the privileged nature of the December 14 meeting and to assist Defense Attorneys in understanding that the meeting is work product, prosecutor Steven Sisneros allowed questions as to the date, location, identity of the participants, what was discussed and whether participants took notes. *Exhibit 59 to Truc Do Declaration, Interview of Det. Ross Diskin, 6/16/10, pp. 13-39.*

- Detective Diskin explained the purpose of the meeting was **to present the case to the prosecutors for a charging decision.** *Id. at page 24, lines 1-13.* (emphasis added)

- Diskin further explained that he presented a PowerPoint to the participants "offering what the investigation had uncovered." *Id. at page 26, lines 13-28.*

- Diskin explained that "there was a debate on whether or not to call it heat stroke or hyperthermia, **which appeared to be the same thing. But they had different reasons for using different terminology.** And so that's what the debate was." *Id. at page 35, lines 20-24.* (emphasis added)

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

In spite of efforts to communicate the privileged nature of the meeting to Defense Attorneys and encourage Defense Attorneys to interview the State's witnesses on other topics relevant to the investigation, Defense Attorneys have focused most of their time during subsequent defense interviews probing into the December 14 meeting and other meetings between the prosecutors, investigators and medical examiners, persistently engaging in efforts to violate the State's work product privilege. *See Exhibit 60 to Truc Do Declaration, Interview of Mike Poling, 6/16/10, pp. 18-25; Exhibit 61 to Truc Do Declaration, Interview of Lt. Tom Boelts, 6/16/10, pp. 5-17.*

Efforts by prosecutors to explain the work product nature of the December 14 meeting by providing information to Defense Attorneys about the meeting were rewarded with the claim by Defense Attorneys that the State had now waived the privilege:

> DO: [I]t's my position …to the extent that there was a privilege, which we don't think that there is, it was I think waived. But what we would like to do if you don't mind Bill [Hughes] is go question by question and if you want to instruct him not to answer that's fine.
>
> HUGHES: I got to leave a standing instruction that it is work product and not appropriate for this interview.

Exhibit 61 to Truc Do Declaration, Interview of Lt. Tom Boelts, 6/16/10, p. 6, lines 7-13.

Examples of questions by Defense Attorney Truc Do illustrating the Defendant's desire to access the attorneys' notes protected by the work product doctrine, in spite of repeated objections by prosecutors, include the following:

> DO: Um, other than yourself specifically, did you see anyone from the County Attorney taking notes? *Exhibit 59 to Truc Do Declaration, Interview of Det. Ross Diskin, 6/16/10, page 8, lines 26-27.*
>
> . . .
>
> LI: In addition to note pads, was anyone typing on computers the way we're typing on them right now? *Id. at Page 9, lines 6-7.*
>
> . . .

DO: So it's possible that there were attorneys from the County Attorney's Office taking notes? You're just not sure. *Id. at Page 9, lines 13-14.*

. . .

DO: Okay. But the best of your recollection, you have seen on at least one or more occasions, for example, Mr. Sisneros here today, with a laptop in front of him? *Id. at Page 9, lines 21-23.. . .*

To no avail, the State has attempted to explain that the December 14 meeting is work product-protected by allowing questioning to establish the nature of the meeting and what transpired. Defense Attorneys now seek to compel more information about the State's December 14 meeting held in anticipation of litigation, and request sanctions against the State. This Court should deny any further attempts by Defendant to violate the State's work product privilege.

Legal Argument

A. Defendant is using *Brady* as an unwarranted discovery device.

To date, the State has disclosed to Defendant all of the State's evidence - approximately 4,600 pages of documents - and has faithfully met its obligations under Rule 15.1, Arizona Rules of Criminal Procedure, including its obligation to provide *Brady* material. "Under *Brady,* the state is required to disclose all plainly exculpatory evidence within its possession and violates due process if it fails to do so, irrespective of its good or bad faith." *State v. O'Dell*, 202 Ariz. 453, 457, 46 P.3d 1074, 1078 (App. 2002) (citing *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218).

The State has disclosed all the information in this case, including all the information provided to the medical examiners. What Defendant really seeks are the conversations between the prosecutors, investigators and medical examiners, and notes taken by the prosecutors during those meetings. Defendant's fabrication of a "controversy" among the medical examiners is nothing more than a thinly disguised ruse to learn the State's legal theories and to access the State's work product. Defendant's insistence that they have a right to explore, in pursuit of

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

undisclosed Brady material, a meeting held by the prosecutors in anticipation of litigation has no legal basis. As noted by the Arizona Court of Appeals in *State v. Acinelli,* 191 Ariz. 66, 71, 952 P.2d 304, 309 (App. 1997):

> Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court.

Id. (quoting *United States v. Navarro,* 737 F.2d 625, 631 (7th Cir.), *cert. denied,* 469 U.S. 1020, 105 S.Ct. 438, 83 L.Ed.2d 364 (1984).

B. Work Product Includes Meetings Held In Anticipation of Litigation and Notes by Prosecutors.

Rule 15.4(b), Arizona Rules of Criminal Procedure, exempts attorney work product from the disclosure requirements of Rule 15 *et seq.* Specifically, the Rule provides:

> (1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecutor, members of the prosecutor's legal or investigative staff or law enforcement officers, or of defense counsel or defense counsel's legal or investigative staff.

Rule 502(f)(2) of the Arizona Rules of Evidence defines "work-product protection" as "the protection that applicable law provides for tangible material (or its intangible equivalent) ***prepared in anticipation of litigation or for trial.***" (emphasis added). Although the work-product doctrine is most frequently asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." *United States v. Nobles,* 422 U.S. 225, 238, 95 S.Ct. 2160, 2170 (1975).

The December 14 meeting was a charging decision meeting.

At the meeting on December 14, 2009, held at the Yavapai County Attorney's Office, the lead investigator from the Yavapai County Sheriff's Office presented the case to the prosecutors

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

for a charging decision in the form of a PowerPoint presentation that summarized and analyzed the investigation.

In *United States v. Armstrong,* 517 U.S. 456, 116 S.Ct. 1480 (1996), the Supreme Court considered the implications of allowing the defendants to examine the basis for the prosecution in a case involving alleged selective prosecution. As noted by the Court:

> We explained in *Wayte* why courts are "properly hesitant to examine the decision whether to prosecute." 470 U.S. at 608, 105 S.Ct., at 1531. Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Id.,* at 607, 105 S.Ct., at 1530. It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.*

Armstrong, 517 U.S. at 465, 116 S.Ct. at 1486 (citing *United States v. Wayte,* 470 U.S. 598, 105 S.Ct. 1524 (1985).

The decision whether to prosecute an offense is within the discretion of the prosecutor and is an executive function of the office. "Choosing which offense to prosecute rests within the duty and discretion of the prosecutor." *State v. Gooch*, 139 Ariz. 365, 367, 678 P.2d 946, 948(1984) (citing *State v. Murphy,* 113 Ariz. 416, 555 P.2d 1110 (1976)); *State v. Faught,* 97 Ariz. 165, 398 P.2d 550 (1965). "The exercise of discretion by the prosecutor in the criminal justice system begins even before a case is filed." *Murphy,* at 418, 555 P.2d at 1112.

The 5-Factor Test for Work Product

In *Brown v. Superior Court In and For Maricopa County,* 137 Ariz. 327, 335, 670 P.2d 725 (1983), the Arizona Supreme Court set forth five factors to be considered in making the

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

determination whether material was "prepared in anticipation of litigation." While *Brown* involved civil litigation, the factors set forth a framework for the analysis useful to this Court.

> First, courts should consider the nature of the event that prompted the preparation of the materials and whether the event is one that is likely to lead to litigation. Implicit in such a consideration is the assumption that the more likely it is that litigation may result from a particular event, the greater the likelihood that materials prepared because of that event will have been prepared in anticipation of litigation.
>
> Second, courts should determine whether the requested materials contain legal analyses and opinions or purely factual contents in order to make inferences about why the document was prepared.
>
> Third, courts should ascertain whether the material was requested or prepared by the party or their representative.... [W]hen litigation is anticipated it is expected that an attorney or party will [have] become involved.
>
> Fourth, courts should consider whether the materials were routinely prepared and, if so, the purposes that were served by that routine preparation. One assumption underlying this factor is that materials prepared in the ordinary course of business are prepared regardless of whether litigation is anticipated. On the other hand anticipation of litigation may be a party's ordinary course of business; thus it is necessary to determine what purposes a routine preparation serves ....
>
> Last, courts should examine the timing of the preparation and ascertain whether specific claims were present or whether discussion or negotiation had occurred at the time the materials were prepared.

Id. (citing Note, *Work Product Discovery: a Multifactor Approach to the Anticipation of Litigation Requirement in Federal rule of Civil Procedure 26(b)93,* 66 Iowa L.Rev. 1277, 1287 (1981)).

Applying these factors to the presentation and meeting of December 14, 2009, it is clear that the meeting meets the criteria of information prepared in "anticipation of litigation." (1) The purpose of the meeting was for law enforcement to present the results of its investigation to the prosecutor for a charging decision. (2) The PowerPoint presentation was prepared by the detective to summarize the investigation and present his analysis of the events in support of

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

criminal charges. (3) The material requested by Defendant was prepared by the prosecution team and any notes taken by prosecutors or others in attendance were clearly the products of the participants' thinking. (4) The PowerPoint was prepared specifically for the meeting and for the purpose of summarizing for the prosecutors a lengthy investigation. (5) Without question, the PowerPoint and notes by participants were prepared in anticipation of litigation.

Attorneys' notes

In *Upjohn v. United States*, 449 U.S. 383, 101 S.Ct. 677 (1981), the United States Supreme Court made it clear that notes taken by attorneys are material entitled to special protection. The Court noted that some states have an absolute rule protecting attorneys' notes from disclosure - "notes of conversations with witness 'are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure.'"*Id.* at 401, 101 S.Ct. at 689, citing from *In re Grand Jury Investigation,* 599 F. 2d 1224, 1231 CA3 1979.

> The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, **they reveal the attorneys' mental processes in evaluating the communications.**

Upjohn, supra, 449 U.S. at 401, 101 S.Ct. at 689. (emphasis added).

Prosecutor's discussions with medical examiners regarding their investigations are included in the work product privilege.

In *United States v. Noble, supra,* the Supreme Court acknowledged that "the realities of litigation in our adversary system" include the fact "that attorneys often must rely on the assistance of investigators and other agents in preparation for trial." *Noble,* 422 US at 238, 95 S.Ct. at 2170. Thus the Court concluded that it was "therefore necessary that the [work-product]

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

doctrine protect material prepared by the agents for the attorney as well as those prepared by the attorney himself." *Id.* 422 U.S. at 238-239, 95 S.Ct. at 2170.

Arizona's statutory scheme makes it clear that the medical examiners have an investigative role involving suspicious deaths and that the duties of the medical examiner require him to advise the prosecutor as to his findings. Under A.R.S. § 11-597(A), the medical examiner must "conduct a death investigation to determine whether or not the public interest requires an external examination, autopsy or other special investigation." The medical examiner is also required to perform an autopsy when requested by the county attorney or the court. *A.R.S. § 11-597(C).* When death is found to be from other than natural causes, the medical examiner has an obligation to notify the county attorney or other law enforcement authority. *A.R.S. § 11-594(A)(6).* Moreover, pursuant to A.R.S. § 11-593(B), peace officers are required to "promptly notify the county medical examiner or alternate medical examiner and [] shall promptly make or cause to be made an investigation of the facts and circumstances surrounding the death ***and report the results to the medical examiner or alternate medical examiners.***" *A.R.S. § 11-593(B).* (emphasis added).

In *State v. Morris,* 215 Ariz. 324, 160 P.3d 203 (2007), the Court noted that it is proper for the prosecution to provide information about the investigation to the medical examiner.

> Arizona statutes permit medical examiners to receive information about the circumstances surrounding a suspicious death. Arizona Revised Statutes section 11-593.B (2001) requires a peace officer to report the results of "an investigation of the facts and circumstances surrounding [a suspicious] death" to the county medical examiner. Moreover, the medical examiner is statutorily required to "[m]ake inquiries regarding the cause and manner of death." A.R.S. § 11-594.A.4 (2001); *see also id.* § 11-594.A.2. The prosecutor did not, therefore, engage in misconduct by giving transcripts of Morris's statements to the medical examiners.

Id.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Pennsylvania has found that a coroner has powers which in fact make him a part of the criminal investigative team of the State. See *Commonwealth v. Anderson,* 253 Pa.Super. 334, 385 A.2d 365 (1978) (noting that the coroner's statutory and common law powers conferred on him the "same status a police officer investigating any suspected crime.") In *Lawyer v. Kernodle,* 721 F.2d 632 (1983, the Eighth Circuit Court of Appeals confirmed that the coroner receives the same qualified immunity conferred on prosecutors and their assistants within the scope of a 1983 action.

> "Prosecutors and their assistants also enjoy immunity from section 1983 actions so long as the actions complained of appear to be within the scope of prosecutorial duties.... This immunity is equally available to investigators for the state prosecutor for actions in connection with a criminal prosecution." We believe that Kernodle should enjoy the same immunity that "investigators for the state prosecutor" enjoy. Kernodle was determining the cause of death of Diana Lawyer and this determination was to be used in the prosecutor's decision whether to institute criminal charges. The deprivation alleged by Lawyer is directly related to the institution of these criminal charges.

Id. at 636.

The presence of the medical examiners at the December 14 meeting neither waived the work product privilege nor otherwise serves to allow Defendant to access the State's legal theories or notes generated therein.

There is no "controversy" among the medical examiners.

Defendant has attempted to manufacture a controversy among the medical examiners where none exists. As explained by the medical examiners themselves and set forth on pages 2-3 in this Response, there is no significant difference between heat stroke and hyperthermia. This fabrication of a "controversy" and the unsupportable allegation by Defense Attorneys that they do not have all the information relied upon by the medical examiners in reaching their

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

conclusions is nothing more than a thinly disguised excuse to violate the State's work product privilege and to discover the State's legal theories.

C. The State has not waived the work product privilege.

As indicated in the Fact section of this Response, the State allowed inquiry into the December 14 meeting in a good faith attempt to resolve the issue with Defense Attorneys. In doing so, however, the State reiterated its position that the meeting, and any notes or documents therefrom, were privileged. To argue now that the State has waived the privilege is simply disingenuous. It is interesting to note that when the State asked the defense attorney whether she would object if the State attempted to question a defense investigator about a meeting between the investigator and defense attorney, the response was in her words, "That's clearly different because the defense investigator is on our staff and is retained by us for that purpose." *Exhibit 62 to Truc Do Declaration, Interview of Dr. Mark Fischione, 6/17/10, p. 39, lines 24-25.*

D. Rule 15.1(g) of the Arizona Rules of Criminal Procedure

Rule 15.1(g), Ariz. R. Crim. P., provides that "upon motion of the defendant showing that the defendant has substantial need in the preparation of the defendant's case for material or information not otherwise covered by Rule 15.1, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available."

Defendant has not filed a motion under Rule 15.1(g) nor can he meet the burden required to prevail thereunder. In fact, Defendant has all of the State's evidence and seeks, in its Motion to Compel, the State's mental impressions and legal theories. Moreover, the rules and case law make it clear that courts will still protect the mental impressions, conclusions and legal theories of the attorneys and agents sought under the hardship doctrine.

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

> "Rule 26(b)(3), [Fed. R. Civ. P.], provides that, even if the party seeking discovery of information otherwise protected by the work product doctrine has made the requisite showing of need and undue hardship, **courts must still protect against the disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney and his agents.** Stated differently, Rule 26(b)(3) establishes two tiers of protection: first, work prepared in anticipation of litigation by an attorney or his agent is discoverable only upon a showing of need and hardship; second, "core" or "opinion" work product that encompasses the "mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation" is "generally afforded near absolute protection from discovery." *Id. In re Ford Motor Co.,* 110 F.3d 954, 962 n. 7 (3d Cir.1997). Thus, core or opinion work product receives greater protection than ordinary work product and is discoverable only upon a showing of rare and exceptional circumstances

In re: Cendant Corporation Securities Litigation, 343 F.3d 658, 663 (3rd Cir. 2003). *See also Upjohn v. United States, supra.*

CONCLUSION

The State has disclosed to Defendant all of the State's evidence – over 4600 pages to date. The State has disclosed all of the evidence that the medical examiners reviewed in reaching their conclusions set forth in their autopsy reports. Defendant's request for the State's work product, including the PowerPoint, the attorneys' notes, and further information about the December 14 meeting as well as information about other meetings of the prosecution team, should be summarily denied.

RESPECTFULLY submitted this 23rd day of July, 2010.

By Sheila Sullivan Polk
SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

COPIES of the foregoing emailed this 23rd day of July, 2010:

COPIES of the foregoing delivered this 23rd day of July, 2010, to

Hon. Warren Darrow
Dtroxell@courts.az.gov

Thomas Kelly
tkkelly@thomaskellypc.com

Truc Do
Tru.Do@mto.com

By: Kathy Durrey

Thomas Kelly
Via courthouse mailbox

Truc Do
Munger, Tolles & Olson LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Via U.S. Mail

By: Kathy Durrey

Office of the Yavapai County Attorney
255 E. Gurley Street
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

Yavapai County Attorney

255 East Gurley Street
Prescott, AZ 86301
(928) 771-3344 (Criminal)
(928) 771-3338 (Civil)
Facsimile (928) 771-3110

SHEILA POLK
Yavapai County Attorney

December 16, 2009

Dr. Mark Fischione
Maricopa County Medical Examiner's Office
701 W. Jefferson Street
Phoenix, AZ 85007

RE: *Yavapai County Sheriff's Office - Case Number 09-040205*

Dear Dr. Fischione:

Thank you for attending the meeting regarding the above-referenced investigation on Monday, December 14, 2009. Your time is valuable and we appreciate your attention to this case.

At the meeting and via email, a copy of the PowerPoint presentation was disseminated. The PowerPoint presentation is privileged material, prepared as work product by the Yavapai County Sheriff's Office to assist in analyzing the facts of the case. Furthermore, it is a work in progress in draft form only. **It is not a public record and not for public dissemination beyond those in attendance at our meeting.** Please ensure that the confidentiality of the document is respected and maintained.

Thank you again for your work on this case. If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,

Sheila S Polk

Sheila Sullivan Polk
Yavapai County Attorney

Exhibit A
Letter from Sheila Polk
dated December 16, 2009